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Supreme Court of the United States

OCTOBER TERM, 19

No. [redacted] 134

WILLIAM A. ALBAUGH, *Petitioner*,

v.

WILLIAM P. ROGERS, Attorney General of the United States, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM A. ALBAUGH
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Petitioner Pro Se

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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WILLIAM P. ROGERS, Attorney General of the United States, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit, dated May 11, 1959, affirming the judgment of the District Court for the District of Columbia, entered February 6, 1959, dismissing petitioner's complaint seeking to have Executive Order No. 10728 declared unconstitutional and the respondent restrained from conducting fund-

raising campaigns for private charitable organizations in pursuance of the order.

The judgment of the District Court is found on page 8 of the record on appeal. The judgment of the Court of Appeals is found on page 7a of Appendix B.

OPINIONS

No opinion was rendered by the Court of Appeals for the District of Columbia Circuit or by the District Court for the District of Columbia.

JURISDICTION

The judgment of the Court of Appeals was entered on May 11, 1959 (App. 7a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether any citizen has a right to contest an Act of the Federal Government which is invalid.

ORGANIC LAWS INVOLVED

The Organic Laws involved are: Declaration of Independence; Constitution Art. I, Sec. 9(7); Constitution Art. II, Sec. 1-3; Constitution Art. VI; Constitutional Amendment, Art. IX; and Constitutional Amendment, Art. X. These Organic Laws are found in Appendix A (pp. 1a-3a).

STATEMENT OF THE CASE

Relying upon 28 U.S.C. 1331 the petitioner William A. Albaugh filed on November 7, 1958 a complaint (R. 1) in the United States District Court for the District of Columbia seeking to have Executive Order No. 10728 Establishing The President's Committee

On Fund-Raising Within The Federal Service (R. 3) declared unconstitutional and to have respondent restrained from using Public Funds in conducting fund-raising campaigns among Federal employees on duty where the monies collected as a result of the campaigns were to be delivered to various private charitable organizations until such time as this particular use was authorized by Congress.

The petitioner, standing upon his rights as a citizen, alleged that the respondent was subject to Executive Order No. 10728 as Head of the Department of Justice and must see that voluntary fund-raising within his department was conducted in accordance with the policies, principles, and procedures prescribed by or pursuant to this order; that the order necessitated the use of Public Funds in conducting fund-raising campaigns among federal employees on duty where the monies collected as a result of the campaigns were to be delivered to various private charitable organizations; and that there was no Constitutional Law nor Congressional Act which authorized this use of Public Funds.

The respondent did not answer the complaint within the time permitted by law.

The District Court on February 6, 1959 entered a judgment (R. 8) granting respondent's motion to dismiss the complaint on the grounds that "the complaint fails to state a claim upon which relief may be granted, in that the plaintiff has no standing to sue" (R. 6).

On May 11, 1959 the Court of Appeals entered a judgment (App. B, p. 7a) granting respondent's motion to affirm (App. B, p. 3a).

ARGUMENT AMPLIFYING REASON RELIED ON FOR GRANTING THE WRIT

Petitioner respectfully submits that this Court should settle whether any citizen has a right to contest an Act of the Federal Government which is invalid.

Previously the Court has never had before it a case involving an invalid Act of the Federal Government being contested by a citizen claiming no special injury. In *Massachusetts* v. *Mellon*, 262 U. S. 447, the Court volunteered the following dictum upon which the respondent relies:

> "The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained some direct injury as a result of this enforcement and not merely that he suffers in some indifferent way in common with people generally."

To establish a rule concerning invalid Acts, the Court must have before it a case involving an invalid Act. Whenever the Court takes official notice that it has before it an invalid Act, the Court is bound by its oath to protect the Constitution to immediately nullify the invalid Act. Therefore the only rule that the Court can establish relating to invalid Acts is that they will be nullified as soon as they are brought before the Court.

In this case the question of whether Executive Order No. 10728 is invalid remains unanswered. The respondent has failed to produce any Constitutional Law or Congressional Act which would specifically authorize fund-raising campaigns for private charitable organizations. The respondent has failed to show that soliciting Government employees for private charitable organizations will reasonably make those

employees better able to perform their regularly assigned duties. The respondent has failed to produce any delegated Governmental function which would be reasonably implemented by this solicitation program.

Lacking both specific authorization and reasonable justification on the basis of general efficiency, Executive Order No. 10728 falls into direct conflict with Constitutional Amendment, Art. X (App. A, p. 3a) and is an invalid Act.

CONCLUSION

WHEREFORE, it is respectfully submitted that the petition for a writ of certiorari as prayed for should be granted.

WILLIAM A. ALBAUGH
1426 - 21st Street, N.W.
Washington 6, D. C.
Petitioner, Pro Se

June 1959

APPENDIX A

Organic Laws Involved

I. Declaration of Independence

". . . We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed,—that whenever any form of Government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness."

II. Constitution, Art. I, Sec. 9(7)

"No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

III. Constitution, Art. II, Sec. 1-3

Sec. 1. "The executive power shall be vested in a president of the United States of America. . . . Before he enter on the execution of his office, he shall take the following oath or affirmation: 'I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will to the best of my ability, preserve, protect and defend the constitution of the United States.'"

Sec. 2. "The president shall be commander in chief of the army and navy of the United States, and of the

militia of the several states, when called into the actual service of the United States; he may require the opinion in writing of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

"He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may by law vest the appointment of such inferior officers, as they think proper in the president alone, in the courts of law, or in the heads of departments. . . ."

Sec. 3. "He shall, from time to time, give to the Congress information of the state of the union, and recommend to their consideration, such measures as he shall judge necessary and expedient; . . . he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States."

IV. Constitution, Art. VI

". . . This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; . . ."

". . . and all executive and judicial officers both of the United States and of the several states, shall be

bound by oath or affirmation, to support this constitution. . . ."

V. Constitutional Amendment, Art. IX

"The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people."

VI. Constitutional Amendment, Art. X

"The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

APPENDIX B

(Filed April 24, 1959)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,056

WILLIAM A. ALBAUGH, *Appellant*,

v.

WILLIAM P. ROGERS, Attorney General of the United States, *Appellee*.

Motion to Affirm

Comes now the appellee by its attorney, the United States Attorney, and moves the Court to affirm the judgment below.

A motion to affirm lies where dismissal of a complaint by the trial court is plainly correct. The questions raised by appellant, summarized in the attached memorandum of points and authorities, are clearly so unsubstantial as

not to require further argument in addition to that fully accorded by the trial court.

/s/ OLIVER GASCH
Oliver Gasch,
United States Attorney.

/s/ CARL W. BELCHER
Carl W. Belcher,
Assistant United States Attorney.

CERTIFICATE OF

/s/ JOHN D. LANE
John D. Lane,
Assistant United States Attorney.

Memorandum of Points and Authorities in Support of Motion to Affirm

Appellee successfully moved to dismiss the action below on the ground that "the complaint fails to state a claim upon which relief may be granted, in that the plaintiff has no standing to sue" (J.A. 6). The complaint seeks a judgment declaring unconstitutional Executive Order No. 10728, a main purpose of the President therein being to promote the efficiency of the Government service by regulating charitable solicitations, traditionally permitted;[1]

[1] The order creates the President's Committee on Fund-Raising within the Federal Service. Exec. Order No. 10728, 22 Fed. Reg. 7219 (1917); J.A. 3-6. As the preamble recites, a main purpose of the order is to provide uniform standards governing charitable solicitations in the interest of their being conducted "in such manner as will occasion minimum interruption of Government functions" (J.A. 3). To achieve this end a "uniform fund-raising program" is required and the number of solicitations restricted (J.A. 3). Solicitations are to be conducted in such manner that "Persons on duty shall be subjected to a minimum of disturbance" (J.A. 4). Record-keeping and administration are to be "kept to a minimum", and the order provides that no additional compensation be paid officers and employees of the Government for services under the order (J.A. 4, 6).

also sought is an injunction restraining the Attorney General from conducting fund-raising campaigns among federal employees in accordance with the executive order (J.A. 2).

There is no allegation that a judicial controversy arises (if any could) by virtue of the application of the order to appellant; he does not claim to be a federal civil servant. The complaint states no statute authorizes fund-raising among federal employees, the gravamen of the allegation being that diversion of civil servants from other duties is in effect an unauthorized "use of Public Funds" (J.A. 2). Appellant asserts equitable jurisdiction to enjoin execution of the order by the Attorney General rests on appellant's alleged interest as a "citizen and taxpayer" in executive activities allegedly unauthorized by the Constitution (J.A. 2).

From the foregoing it is immediately clear that, as the court below ruled, appellant has no standing. To invoke the power of constitutional review

> "The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

Massachusetts v. *Mellon*, 262 U.S. 447, 488 (1923). See also *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240 (1937).

Appellant urges (Br. 6) that application of the above principle in such cases as the present one would be to substitute a rule of force for one of law. This contention puts out of view the nature of judicial power conferred in our tripartite form of government. To have standing in court individuals "must show an injury or threat to a particular right of their own, as distinguished from the

public's interest in the administration of the law." *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 125 (1945). Questions which are abstract in judicial forums, such as here the wisdom of the utilization of executive subordinates by the President, are for decision by the people through their representative electorate. See *Massachusetts* v. *Mellon*, supra at 488.

A motion to affirm lies where dismissal of a complaint below is plainly correct. *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923). The questions raised by appellant, summarized above, are clearly so unsubstantial as not to require further argument in addition to that fully accorded by the trial court.

/s/ OLIVER GASCH
Oliver Gasch,
United States Attorney.

/s/ CARL W. BELCHER
Carl W. Belcher,
Assistant United States Attorney.

/s/ JOHN D. LANE
John D. Lane,
Assistant United States Attorney.

Memorandum of Points and Authorities in Opposition to Motion to Affirm

1. Prior to this administration, charitable solicitations within the Government Service had never been officially permitted. And in many Government buildings there had been posted signs saying that no soliciting was permitted.

2. Executive Order No. 10728 specifies that "Persons on duty shall be subjected to a minimum of disturbance" (App. 4) and that record-keeping and administration are to be "kept to a minimum". Taking the Government's

own definition of efficiency, the optimum condition is to have no solicitation program at all. Efficiency then would hardly be a justification for officially recognizing and introducing the solicitation program for the first time.

3. If there is no Constitutional or Congressional Law which authorizes the solicitation program, the Executive Order No. 10728 comes into direct conflict with Constitutional Amendment X.

/s/ WILLIAM A. ALBAUGH
William A. Albaugh,
Appellant, Pro Se.

Before: Wilbur K. Miller, Danaher and Burger, *Circuit Judges,* in Chambers.

Order

Upon consideration of appellee's motion to affirm and of appellant's memorandum of points and authorities in opposition, it is

ORDERED by the court that the judgment of the District Court appealed from herein is affirmed.

Per Curiam

Dated: May 11, 1959

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

Filed May 11, 1959

JOSEPH W. STEWART
Clerk

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Supreme Court, U.S.
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JAMES R. BROWNING, Clerk

No. 164

In the Supreme Court of the United States

OCTOBER TERM, 1959

WILLIAM A. ALBAUGH, PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. ROSS,
Special Assistant to the Attorney General,
BARBARA A. BABCOCK,
WILLIAM H. KUELLER,
Attorneys,
Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 134

WILLIAM A. ALBAUGH, PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The *per curiam* order of the Court of Appeals for the District of Columbia Circuit, dated May 11, 1959, affirming the judgment of the District Court (Pet. App. 7a), has not been reported. The judgment of the District Court for the District of Columbia has not been reported (R. 8[1]).

JURISDICTION

The order of the Court of Appeals was entered on May 11, 1959 (see Pet. App. 7a). The petition for a writ of certiorari was filed on June 22, 1959.

[1] The designation "R.", as used in the petition and this brief, refers to the Appellant's Appendix in the Court of Appeals.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, a "citizen claiming no special injury," may challenge the legality of charitable fund-raising campaigns among federal employees.

STATEMENT

On November 7, 1958, petitioner filed a complaint in the District Court for the District of Columbia seeking declaratory relief invalidating Executive Order No. 10728, Establishing the President's Committee on Fund-Raising Within the Federal Service (R. 3–6), and an order enjoining the respondent from conducting fund-raising campaigns for charity among federal employees in accordance with the Executive Order (R. 1, 2). On February 6, 1959, the District Court entered judgment for the respondent on the ground that the petitioner lacked standing to sue (R. 8). The petitioner appealed (R. 8), and on May 11, 1959, the Court of Appeals for the District of Columbia Circuit granted the respondent's motion to affirm (Pet. App. 7a).

ARGUMENT

This action is based on the theory that the diversion of civil servants from other duties to fund raising for private charities is an unauthorized use of public funds (R. 2). The fact is that the Executive Order sought to be challenged was designed to promote the efficiency of the government service by regulating solicitations for charitable causes among

federal employees, a privilege traditionally permitted (R. 3–6).[2] It is clearly within the President's executive power. U.S. Const., Art. II, Sec. 1, cl. 1. For present purposes, however, it is enough to point out that petitioner is, by his own description (Pet. 4), a "citizen claiming no special injury"; it is therefore clear that he has no standing, and that his action does not present a justiciable controversy. *Massachusetts* v. *Mellon*, 262 U.S. 447; *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
WILLIAM E. MULLIN,
Attorneys.

JULY 1959.

[2] The Order creates the President's Committee on Fund-Raising Within the Federal Service. 23 Fed. Reg. 7219 (1957) (R. 3–6). As the preamble recites, a main purpose of the Order is to provide uniform standards governing charitable solicitations in the interest of their being conducted "in such manner as will occasion minimum interruption of Government functions" (R. 3). To achieve this end, a "uniform fund-raising program" is required, and the number of solicitations must be restricted (R. 3). Solicitations are to be conducted in such manner that "Persons on duty shall be subjected to a minimum of disturbance" (R. 4). Record-keeping and administration are to be "held to a minimum", and the order provides that no additional compensation be paid officers and employees of the Government for services under the Order (R. 4, 6).

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